No. 93-141

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

WEST LYNN CREAMERY, INC. AND
LECOMTE'S DAIRY, INC., PETITIONERS

V.

JONATHAN HEALY, COMMISSIONER
OF THE MASSACHUSETTS DEPARTMENT
OF FOOD AND AGRICULTURE

ON WRIT OF CERTIORARI TO THE
SUPREME JUDICIAL COURT OF MASSACHUSETTS

REPLY BRIEF FOR THE PETITIONERS

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TABLE OF AUTHORITIES

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Respondent does not dispute the basic principles that govern this case: "the Commerce Clause prohibits economic protectionism," *New Energy Co.* v. *Limbach*, 486 U.S. 269, 273 (1988); a state law that "amounts to simple economic protectionism" is subject to "a virtually *per se* rule of invalidity," *Wyoming* v. *Oklahoma*, 112 S. Ct. 789, 800

(1992) (quotation omitted); and "[a] finding that state legislation constitutes 'economic protectionism' may be made on the basis of either discriminatory purpose, or discriminatory effect," *Bacchus Imports, Ltd.* v. *Dias*, 468 U.S. 263, 270 (1984) (citation omitted); *see also Minnesota* v. *Clover Leaf Creamery Co.*, 449 U.S. 456, 471 n.15 (1981). Respondent's effort to defend the Massachusetts Pricing Order under these principles is wholly unpersuasive. The *stated* purpose of the Pricing Order is to protect the Massachusetts dairy industry from out-of-state competition. And the "overall effect" of the Order, *Brown-Forman Distillers Corp.* v. *New York State Liquor Auth.*, 476 U.S. 573, 579 (1986), is blatantly protectionist.

1. Petitioners' opening brief demonstrated (Pet. Br. 17-25) that this case is largely controlled by *Baldwin* v. *G.A.F. Seelig, Inc.*, 294 U.S. 511 (1935), a decision respondent ignores until the end of his brief. *See* Resp. Br. 35-38.[1/] The *Baldwin* Court unanimously held that the State of New York could not require milk processors to pay a state-established minimum price to out-of-state farmers, because such a requirement had "the aim and effect of establishing an economic barrier against competition with the products of another state." 294 U.S. at 527.

The Massachusetts Pricing Order has precisely the same aim and effect as the New York law struck down in *Baldwin*. Massachusetts, like New York, seeks to protect its dairy industry from out-of-state competition by ensuring that its farmers receive a state-established minimum price for their milk. Massachusetts, like New York, seeks to prevent its

[1/] Respondent's sole argument is that *Baldwin* is distinguishable under this Court's decision in *Henneford* v. *Silas Mason Co.*, 300 U.S. 577 (1937). *See* Resp. Br. 35-38. As we show, *see* pp. 11-12 *infra*, respondent is incorrect; *Henneford* is not applicable because the Massachusetts Pricing Order places an unequal burden on out-of-state milk, and requires out-of-state dairy farmers to surrender their competitive advantages.

farmers from losing sales to out-of-state farmers. If Massachusetts had required milk processors to pay the "Massachusetts premium" (the difference between the federal minimum price and the Massachusetts minimum price) directly to out-of-state farmers, the Order would be essentially identical to the law invalidated in *Baldwin*. The Massachusetts Pricing Order differs only by requiring that the premiums on sales by out-of-state farmers be paid to in-state farmers. Thus, the Massachusetts Pricing Order is even worse than the New York law struck down in *Baldwin*. The Pricing Order not only sets a minimum price for out-of-state milk, but also facially discriminates against out-of-state farmers and their customers. This facial discrimination against out-of-state farmers is an *additional* reason why the Order is unconstitutional; it cannot possibly render a *Baldwin* scheme constitutional.

2. Respondent's discussion of the purpose of the Pricing Order (Resp. Br. 16-20) ignores its *stated* purpose, which is economic protectionism. The Order states that its purpose is to "provide an immediate interim solution to the state of emergency facing the Massachusetts dairy industry" by "set[ting] a target minimum price to be paid by milk dealers to Massachusetts producers" under "terms and conditions" that "take into consideration the regional nature of the flow of milk." J.A. 32. Similarly, respondent's findings in support of the Order state that "we must act . . . to preserve our local industry" and "maintain reasonable minimum prices for the dairy farmers," and that "[i]f no action is taken, the entire New England dairy industry will collapse and milk will be imported from greater and greater distances." J.A. 29, 31. A clearer statement of a protectionist purpose is difficult to imagine.

Respondent nevertheless contends (Resp. Br. 16) that the purpose of the Order is "solely to save an industry from collapse" (quoting J.A. 128), and that this purpose is not protectionist in nature. That simply is not so. It is well

settled that "the propriety of economic protectionism may not be allowed to hinge upon the State's — or this Court's — characterization of the industry as either 'thriving' or 'struggling.'" *Bacchus Imports*, 468 U.S. at 273. Moreover, "it is irrelevant to the Commerce Clause inquiry that the motivation of the [State] was the desire to aid the makers of the locally produced [product] rather than to harm out-of-state producers." *Id.*

Respondent broadly asserts that "States may enact laws 'that have the purpose and effect of encouraging domestic industry.'" Resp. Br. 16-17 (quoting *Bacchus Imports*, 468 U.S. at 271). Respondent omits the very next sentence of the Court's opinion in *Bacchus Imports*, which adds that "the Commerce Clause stands as a limitation on the means by which a State can constitutionally seek to achieve that goal." 468 U.S. at 271. Accordingly, this Court has "often examined a 'presumably legitimate goal,' only to find that the State attempted to achieve it by 'the illegitimate means of isolating the State from the national economy.'" *Wyoming* v. *Oklahoma*, 112 S. Ct. at 801 (quoting *Philadelphia* v. *New Jersey*, 437 U.S. 617, 627 (1978)). That is precisely what Massachusetts is attempting to do here.

Respondent also asserts that the purpose of the Pricing Order is to "preserve hundreds of thousands of acres of open lands 'that are used as wildlife refuges, for recreation, hunting, fishing, tourism, and education.'" Resp. Br. 17 (quoting J.A. 13). Respondent did not make that argument in the Massachusetts Supreme Judicial Court, and neither that court's opinion nor the Pricing Order itself even suggests that the purpose of the Order is preservation of open lands.[2/] In any event, the Commerce Clause prevents States from isolating themselves from the national economy, even if the

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[2/] Such an alleged purpose is even more tangential to milk price regulations than the need for "sanitary security" advanced (and rejected) in *Baldwin*. *See* 294 U.S. at 523-24.

State's purpose is to preserve open space rather than to favor its domestic industry. *See Philadelphia* v. *New Jersey*, 437 U.S. 617 (1978) (State may not preserve open lands by barring importation of waste from other States).

Next, respondent asserts (Resp. Br. 17-18) that the purpose of the Pricing Order is not protectionist because its burden "falls extensively upon Massachusetts interests." *Id.* at 17. That argument confuses the purpose of the Order with its effects. And as an argument about effects, it is incorrect. Protectionist legislation generally burdens in-state buyers, who are prevented from purchasing cheaper imported goods. It does not follow that the effect of such laws, let alone their purpose, is not protectionist. *See Bacchus Imports*, 468 U.S. at 272 (court "erred in concluding that there was no improper discrimination against interstate commerce merely because the burden of the tax was borne by [in-state] consumers").[3/]

Respondent further confuses purpose and effect by arguing (Br. 18-19) that the purpose of the Order is not protectionist because the Massachusetts Supreme Judicial Court found that petitioners had not demonstrated harmful effects on out-of-state interests. But state laws, such as the Massachusetts Pricing Order, that facially discriminate against interstate commerce are subject to what amounts to a *per se* rule of invalidity; plaintiffs are not required to present evidence that the laws have in fact caused measurable harm to identifiable out-of-state parties. *See Wyoming* v.

[3/] Respondent also errs in suggesting (Resp. Br. 18) that, because petitioners happen to be located in Massachusetts, they "must look to the political process for protection." The Commerce Clause not only guarantees that "every farmer . . . will have free access to every market in the Nation," but also that "every consumer may look to the free competition from every producing area in the Nation to protect him from exploitation by any." *Hood & Sons, Inc.* v. *Du Mond*, 336 U.S. 525, 539 (1949). Indeed, the successful plaintiffs in *Baldwin*, *see* 294 U.S. at 518, and *Polar Ice Cream & Creamery Co.* v. *Andrews*, 375 U.S. 361, 363 (1964), were milk processors located in the State that imposed the unconstitutional restrictions.

Oklahoma, 112 S. Ct. at 801; *Limbach*, 486 U.S. at 276. Moreover, respondent is quite wrong in asserting that "[a]ny local pricing advantage of out-of-state farmers is unaffected by the Order." Resp. Br. 18. The Pricing Order negates the out-of-state farmer's efficiency advantage by setting a minimum price on out-of-state milk higher than that voluntarily negotiated between buyers and sellers, and by providing a direct commercial advantage to in-state farmers. *See* Vermont Br. 14 (Massachusetts Pricing Order "injures already struggling farmers in export states like Vermont"); *see also* pp. 12-13 *infra* (describing effects of Order).

Next, respondent observes (Resp. Br. 19) that the Order creates an incentive for Massachusetts consumers to purchase lower-priced milk outside the State. Again, respondent's argument concerns effects rather than purposes, and is invalid. Tariffs and similar protectionist measures always create an incentive for in-state consumers to avoid the tariff. As *Baldwin* and other cases demonstrate, this feature of protectionist laws does not remotely show the absence of a protectionist purpose. It would be extraordinary if the openly protectionist purpose of the Massachusetts Pricing Order could be overcome by the suggestion that Boston consumers could make weekly milk runs across the New Hampshire border.

Finally, respondent contends (Resp. Br. 19-20) that the purpose of the Pricing Order is not economic protectionism because other States that are net exporters of milk have adopted similar laws. The short answer to this contention is that speculation about the legislative purposes of other States cannot supplant the clear statement of purpose in the Massachusetts Pricing Order itself. In any event, a Pricing Order designed to insulate a State's dairy farmers from competition for in-state sales would be no less protectionist if it were adopted by a State that is a net exporter of milk.

In short, respondent's efforts to overcome the openly protectionist purpose of the Pricing Order are unavailing. On that basis alone, the Order is unconstitutional. *Bacchus Imports*, 468 U.S. at 270.

3. Respondent's primary argument with respect to discriminatory effect is that the Pricing Order is lawful because it purportedly comprises two elements — a uniform assessment on sales of fluid milk for consumption in Massachusetts and a subsidy to Massachusetts dairy farmers — each of which assertedly would be lawful if adopted separately. *See* Resp. Br. 20-39. Respondent's argument rests on a simple fallacy. Actions that are lawful standing alone are not necessarily lawful in combination. It may be lawful for a person to drive, and also lawful for her to drink alcoholic beverages, but there is no argument that "[s]ince [drinking] and [driving] are lawful, taken separately, it would be surprising if the [law] somehow prohibited . . . these two measures" in combination. Resp. Br. 31.

The Court has expressly rejected this fallacy in analyzing state laws under the Commerce Clause. *Brown-Forman Distillers*, 476 U.S. at 579 ("the critical consideration is the overall effect of the [law] on both local and interstate activity"); *Maryland* v. *Louisiana*, 451 U.S. 725, 756 (1981) ("[a] state tax must be assessed in light of its actual effect considered in conjunction with other provisions of the State's tax scheme"); *Halliburton Oil Well Cementing Co.* v. *Reily*, 373 U.S. 64, 69 (1963) ("a proper analysis must take the whole scheme of taxation into account" (quotation omitted)). Respondent ignores this settled principle by discussing individual features of the Pricing Order as if its other features did not exist.

If the Court were to accept respondent's fallacious reasoning, little would remain of the negative Commerce Clause. Under respondent's approach, the States could impose tariffs through a simple two-step process. First, the

State could enact a uniform tax on in-state and out-of-state goods sold within the State. Second, the State could provide for a rebate of the tax to in-state producers. As respondent recognizes (Resp. Br. 27 n.23), Commerce Clause analysis no longer turns on such formalisms. *See Complete Auto Transit, Inc.* v. *Brady*, 430 U.S. 274, 288 (1977).

a. Respondent contends (Resp. Br. 21-24) that the Pricing Order is a constitutionally permissible subsidy to domestic industry. That is incorrect. Although "[d]irect subsidization of domestic industry does not ordinarily run afoul of [the Commerce Clause]," a State may not take action "in connection with the State's regulation of interstate commerce" that is "designed to gives [the State's] residents an advantage in the marketplace." *Limbach*, 486 U.S. at 278 (emphasis omitted). The Massachusetts Pricing Order plainly is an unconstitutional regulation of interstate commerce rather than a permissible direct subsidy.

"A subsidy involves the direct transfer of public monies to the subsidized enterprise and uses resources exacted from taxpayers as a whole." *Walz* v. *Tax Comm'n*, 397 U.S. 664, 690 (1970) (Brennan, J., concurring); *accord Texas Monthly, Inc.* v. *Bullock*, 489 U.S. 1, 35 (1989) (Scalia, J., dissenting); *Committee for Public Educ. & Religious Liberty* v. *Nyquist*, 413 U.S. 756, 806-07 (1973) (Rehnquist, J., dissenting in part). Because subsidies are both expensive to taxpayers and highly visible, they are constrained by the state political process. Many voters who pay state income or sales taxes are likely to oppose "government hand outs" of general revenues to industries with which they have no connection. Even if a subsidy proposal does not arouse strong political opposition, it must compete with other public spending proposals. Consequently, state legislatures will appropriate general revenues — usually for a year at a time — only if there is a sufficient political consensus that the subsidy should take precedence over additional spending for public safety, education, and other important purposes. Given these

political constraints, direct subsidies are unlikely to be numerous or large enough to interfere seriously with interstate commerce. In addition, subsidies may be less injurious to interstate commerce than other forms of discriminatory state legislation because they lower, rather than raise, the cost of goods to the consumer.[4/]

As the Court noted in *Limbach*, "[t]o believe [that a subsidy] scheme is valid . . . is not to believe that [a regulatory scheme] must be valid as well." 486 U.S. at 278. The Massachusetts Pricing Order is far from the paradigm of a constitutional direct subsidy. Payments to Massachusetts farmers are not financed by resources exacted from the State's taxpayers as a whole, but instead reflect a state-mandated increase in the minimum price processors must pay for milk. The Order is framed as a regulation of the price of milk by a state administrative agency rather than an appropriation of public funds by the state legislature. The program of payments to Massachusetts farmers does not compete with other public spending proposals. The Order expressly provides that premiums "shall be distributed directly to Massachusetts producers," J.A. 37; the premiums are

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[4/] Commentators have recognized that subsidies may pose less of a threat to interstate commerce than other types of state action. *See, e.g.*, Dan T. Coenen, *Untangling the Market-Participant Exemption to the Dormant Commerce Clause*, 88 Mich. L. Rev. 395, 479 (1989) (subsidies "present visible preferences of one in-state constituency over another; thus, they are more likely than tariffs to engender resistance in the local legislative process"); Richard B. Collins, *Economic Union As A Constitutional Value*, 63 N.Y.U. L. Rev. 43, 102-03 (1988) ("political restraint works more reliably when states spend their citizens' tax money on subsidies than when they merely allocate advantages among classes of private persons through regulation"); Donald H. Regan, *The Supreme Court and State Protectionism: Making Sense of the Dormant Commerce Clause*, 84 Mich. L. Rev. 1091, 1194-95 (1986) (suggesting several reasons why discriminatory state spending programs may be less objectionable under the Commerce Clause than regulations or taxes); Jonathan D. Varat, *State "Citizenship" and Interstate Equality*, 48 U. Chi. L. Rev. 487, 544 (1981) (noting that subsidies, unlike price regulation, lower rather than raise prices to consumers).

segregated from the State's general revenues and distributed to farmers within days.[5/] Thus, contrary to respondent's contention (Resp. Br. 31 n.27), the Massachusetts Pricing Order is a regulation of interstate commerce rather than a "grant of funds or property from a government . . . to a private person or company . . . as a simple gift or a payment of an amount in excess of the usual charges for a service." *Webster's Third New International Dictionary* 2279 (1968). Moreover, unlike a true subsidy, the Order raises rather than lowers the price of milk to consumers.[6/]

b. Respondent also contends (Resp. Br. 25-29) that Massachusetts constitutionally could require processors to pay a uniform tax on all milk purchased for consumption in Massachusetts, including milk purchased from out-of-state farmers. Again, respondent proceeds as if the Pricing Order were a simple revenue-raising measure, ignoring the express provision of the Order that "[a]ll amounts received pursuant to this Order . . . shall be distributed directly to Massachusetts producers." J.A. 37. The Order as a whole — the exactions from processors and the distributions to farmers — violates the "cardinal rule of Commerce Clause jurisprudence" that "[n]o State . . . may 'impose a tax which discriminates against interstate commerce . . . by providing a direct commercial advantage to local business.'" *Bacchus Imports*, 468 U.S. at 268 (quoting *Boston Stock Exch.* v. *State Tax Comm'n*, 429 U.S. 318, 329 (1977), quoting, in

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[5/] *See* J.A. 34 (processor payments due by the 25th day of the month); *id.* at 36 (distributions to farmers made on the 5th day of the following month).

[6/] Respondent is far off the mark in suggesting (Resp. Br. 23, 37 n.32) that the "market participant doctrine" applies to this case. In *Limbach*, the Court flatly rejected the contention that any state program that has the purpose and effect of supporting state industry is "a form of state participation in the free market." 486 U.S. at 277. The state activity at issue here — regulating the price of fluid milk and distributing monies exacted from milk processors to in-state farmers — "cannot plausibly be analogized to the activity of a private purchaser." *Id.* at 278.

turn, *Northwestern States Portland Cement Co.* v. *Minnesota*, 358 U.S. 450, 458 (1959)).[7/]

Respondent emphasizes that the assessment, considered in isolation, is facially "evenhanded" because it applies to all milk purchased for consumption in Massachusetts. But "[t]he fact that [a law] has the advantage of appearing nondiscriminatory does not save it from invalidation." *Tyler Pipe Indus., Inc.* v. *Washington State Dep't of Revenue*, 483 U.S. 232, 248 (1987) (quotation omitted); *see also Hunt* v. *Washington State Apple Advertising Comm'n*, 432 U.S. 333, 352-53 (1977). In *Baldwin*, the State enacted a facially "evenhanded" requirement that processors pay a uniform minimum price for in-state and out-of-state milk. The Court nevertheless held that the law was invalid because it had the practical effect of discriminating against out-of-state farmers by preventing them from making additional sales at a lower price. The result would be no different if a State collected a premium from processors and then distributed it, on a pro rata basis, to both in-state and out-of-state farmers. It follows *a fortiori* that the Commerce Clause prevents Massachusetts from collecting a premium on all sales and distributing it solely to *in-state* farmers.

Henneford v. *Silas Mason Co.*, 300 U.S. 577 (1937), does not support respondent's argument. *Henneford* involved a use tax on goods brought in from out-of-state that was identical to the sales tax applicable to goods sold within the State. In-state sellers obtained no competitive advantage from this tax scheme, and out-of-state sellers retained whatever

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[7/] *See also* Varat, 48 U. Chi. L. Rev. at 542 ("[S]tates are forbidden to tax out-of-state businesses more heavily than in-state businesses, and . . . the same impermissible result would be produced if resident and nonresident businesses were equally taxed but only resident businesses received cash subsidy rebates." (footnotes omitted)); Collins, 63 N.Y.U. L. Rev. at 98 n.332 ("An earmarked tax on locally subsidized goods paid by the industry would presumably be struck down, since the tax and subsidy scheme together would constitute a discriminatory tax").

price advantage they had as a result of greater efficiency. But in this case, as in *Baldwin*, the State has effectively eliminated all price differences below the State-established minimum price, including differences resulting from the greater efficiency of out-of-state farmers. In addition, payment of the Massachusetts premium derived from out-of-state sales to in-state farmers facially discriminates against out-of-state competitors, a factor not present in *Henneford*. *Henneford* thus might be of some help to respondent if Massachusetts levied a flat or percentage tax on all sales of fluid milk and used the revenue for general state purposes, such as road building and paying the salaries of state employees. But that is simply not this case.

An example illustrates the discriminatory effect of the Pricing Order. Suppose the federal minimum price for fluid milk is $14/cwt, the federal blend price is $12/cwt, and processors are paying a negotiated premium of $.50/cwt in the absence of the Massachusetts Order.[8/] Under the Federal Milk Marketing Order System, fluid milk processors will pay $14.50/cwt (the $14 federal minimum price plus the $.50 negotiated premium) for both in-state and out-of-state milk, while both in-state and out-of-state farmers will receive $12.50/cwt (the $12 federal blend price plus the $.50 negotiated premium). As a result of the Massachusetts Order, however, processors will be required to pay at least $15/cwt ($14/cwt plus a $1 cwt Massachusetts premium), and in-state farmers will receive at least $15 (the $12 federal blend price

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[8/] Under the Federal Milk Marketing Order System, processors must pay a minimum price that is based on their use of the milk; dairy farmers receive a uniform "blend price" that is a weighted average of the minimum price paid by all processors. *See* MIF Br. 2-4. Sales to fluid milk processors in Massachusetts have commanded negotiated premiums (also known as "over-order premiums") in recent years. *See* Agric. Mktg. Serv., Dairy Div., U.S. Dep't of Agric., *Dairy Market News* (Dec. 1992-Nov. 1993).

plus a $3 distribution under the Massachusetts Order).[9/] Out-of-state farmers receive nothing under the Order. Consequently, they would have to *negotiate* a $3/cwt premium to match the in-state farmer's minimum compensation of $15/cwt; in that case, the price to the processor for out-of-state milk would be $18/cwt, far above the $15/cwt that the processor pays for in-state milk. If the out-of-state farmer instead meets the $15/cwt price for in-state milk, he receives only $12/cwt, far less than the $15/cwt his in-state competitors receive, and less than the $12.50 he would receive in the absence of the Massachusetts Order.[10/]

Respondent argues that the State's authority to impose a uniform tax on sales of milk for consumption in Massachusetts rests on its "authority to raise [its] own revenues." Resp. Br. 27 (quotation omitted). But the stated purpose of the Order is not to raise revenue for the State, but to fix the price paid to Massachusetts farmers for milk. As the State itself explained in a prior pleading,

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[9/] The Massachusetts premium is one-third of the difference between $15 and the federal blend price. *See* J.A. 35. Thus, if the federal blend price is $12/cwt, the Massachusetts premium is $1/cwt. A premium of $1/cwt will result in payments to Massachusetts farmers of about $3/cwt of milk production. That is so because the total volume of milk produced by Massachusetts dairy farmers is roughly one-third of the total volume of *fluid* milk sold by processors for consumption in Massachusetts. *See* J.A. 82. Consequently, the amount of money distributed to Massachusetts farmers under the Order per hundredweight of milk produced is roughly three times the amount collected from processors per hundredweight of fluid milk sold.

[10/] Respondent's assertion (Br. 24) that payments to Massachusetts farmers will be used to "pay off farm debt and to invest" rather than to reduce prices is sheer speculation. Moreover, as respondent himself appears to recognize (*id.* at 24 n.20), farmers' private decisions, based on "market forces," about how to spend the Massachusetts premium are of no constitutional significance. As the above description demonstrates, out-of-state farmers are put at a large competitive disadvantage regardless of whether in-state farmers reduce their prices.

> the premium payments required by the Pricing Order are not taxes because they do not provide for the general support of state government, or defray a public expense. They are instead payments to dairy farmers by milk dealers as part of the prices established pursuant to the pervasive regulation of the dairy industry in Massachusetts.[11/]

Finally, respondent contends (Resp. Br. 28-29) that there is no Commerce Clause violation because "the subsidized farming operations do not compete with the dealers' processing operations." *Id.* at 29 (emphasis omitted). That argument is frivolous. As *Baldwin* illustrates, a State cannot evade the constitutional prohibition of trade barriers simply by requiring distributors, rather than the producers, to pay the tariff. In any event, the Pricing Order discriminates not only against out-of-state farmers, but also against processors such as petitioners, who in the absence of the Order would take advantage of lower-priced out-of-state milk.

c. When respondent finally turns to the Pricing Order as a whole, he makes only two arguments (Resp. Br. 30-39) that "linkage" of the assessment and the payments to in-state farmers is constitutional. Both arguments are invalid.

Respondent argues (Resp. Br. 30-35) that the Pricing Order would be constitutional if the State deposited payments by milk processors into its general fund and paid farmers out of that fund, and that consequently it should make no difference that the State segregates the proceeds of the Pricing

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11/ Memorandum of the Department of Food and Agriculture in Support of Motion for Summary Judgment in *Association of New England Milk Dealers* v. *Massachusetts Department of Food and Agriculture*, Sup. Ct. C.A. No. 92-1283-E (Suffolk Cty. Mass.), pp. 28-29. *See also* J.A. 23 ("The envisioned scheme is not a tax, and the monies would not be deposited into the general fund. The necessary program would raise the price a farmer receives for his milk and the money would be distributed, from a trust fund, to the farmer.").

Order in a special fund. *See also* MADF Br. 20 ("[P]etitioners would have no complaint if Massachusetts had enacted . . . a nondiscriminatory tax payable to the state treasury . . . and a subsidy to the Commonwealth's dairy farmers out of funds in the general treasury."). That argument is invalid because its premise is false: The Pricing Order would *not* be constitutional if the State deposited payments from processors in the State's general fund and then made payments out of the general fund to Massachusetts farmers. Such a scheme would have precisely the same protectionist purpose and effect as the Pricing Order under review, and therefore would violate the Commerce Clause.

Although the State could not save the Pricing Order simply by running its proceeds through the general fund, the State's decision to establish a separate fund raises *additional* constitutional issues. Once funds are deposited in the State's general fund, voters and state legislators may regard them as available for a variety of competing purposes. Indeed, respondent concedes that the purpose of the segregated fund is to eliminate "the political risk that the money would be used not only for the subsidy program, but also to defray the cost of providing *all* government services." Resp. Br. 31 (quotation omitted). The separate fund thus insulates the payments to farmers from the state political process.

Respondent also argues (Resp. Br. 35-39) that the Pricing Order is not an "extraterritorial pricing scheme" and therefore is not prohibited under *Baldwin*. In attempting to distinguish *Baldwin*, respondent relies solely on this court's decision in *Henneford*. As we have explained, *see* pp. 11-12 *supra*, *Henneford* is not applicable because the Pricing Order places an *unequal* burden on out-of-state milk, and requires "that producers . . . in other States surrender whatever competitive

advantages they may possess." *Brown-Forman Distillers*, 476 U.S. at 580.[12/]

4. Finally, respondent is incorrect in arguing (Resp. Br. 40-42) that the Pricing Order is constitutional under the balancing analysis of *Pike* v. *Bruce Church, Inc.*, 397 U.S. 137 (1970).[13/] The local interest involved — protection of in-state dairy farmers from out-of-state competition — "is almost never a legitimate local purpose." *Maine* v. *Taylor*, 477 U.S. 131, 148 (1986). And the State's general interest in promoting its dairy industry could be promoted as effectively through a direct subsidy to in-state farmers from the State's general revenues. Contrary to respondent's contention, a direct subsidy would have less drastic effects on interstate commerce because it would not establish a minimum price for milk, would not divert proceeds from sales by out-of-state farmers to their in-state competitors, would lower rather than raise prices, and would be constrained by the political process.

[12/] Respondent is plainly incorrect in asserting that the Massachusetts Pricing Order "resembles milk laws that this Court has upheld under the Commerce Clause on the ground that they affect only the essentially local activities of milk sales and production." Resp. Br. 39 (citations omitted). "The Court has . . . long since rejected any suggestion that a state tax or regulation affecting interstate commerce is immune from Commerce Clause scrutiny because it attaches only to a 'local' or intrastate activity." *Commonwealth Edison Co.* v. *Montana*, 453 U.S. 609, 615 (1981) (collecting cases). The purpose and effect of the Massachusetts Order are to set a minimum price for both in-state and out-of-state milk, and to prevent Massachusetts dairy farmers from losing sales to out-of-state farmers. The Order thus operates as a direct regulation on interstate commerce.

[13/] Respondent's assertion that the Massachusetts Pricing Order is subject to the four-part test of *Complete Auto Transit, Inc.* v. *Brady*, 430 U.S. 274 (1977), is incorrect. As we have demonstrated, *see* pp. 10-14 *supra*, the Pricing Order, considered as a whole, is a regulation of interstate commerce rather than a revenue-raising measure. In any event, the Pricing Order flunks the *Complete Auto* test because it facially discriminates against interstate commerce.

If the Massachusetts Pricing Order is constitutional, other States can and will adopt similar laws to protect their dairy farmers.[14/] And if state laws protecting the dairy industry are constitutional, then States can and will adopt laws insulating other industries from out-of-state competitors. For example, California could require computer dealers to make payments to California computer manufacturers based upon the dealers' purchases of computers from out-of-state manufacturers — including manufacturers located in Massachusetts. No doubt Massachusetts would respond in kind, and protectionist laws would proliferate. *See Hood*, 336 U.S. at 539 (describing "fantastic rivalries and dislocations and reprisals [that] would ensue" if States were permitted to "decree that industries located in that state shall have priority"). Respondent's argument is thus directly contrary to the fundamental principle that underlies the Commerce Clause, "that the peoples of the several states must sink or swim together, and that in the long run prosperity and salvation are in union and not division." *Baldwin*, 294 U.S. at 523.

[14/] At least three other States have already enacted laws similar to the Massachusetts Pricing Order. *See Marigold Foods, Inc.* v. *Redalen*, 834 F. Supp. 1163 (D. Minn. 1993); *Farmland Dairies* v. *McGuire*, 789 F. Supp. 1243 (S.D.N.Y. 1992); *Cumberland Farms, Inc.* v. *LaFaver*, 834 F. Supp. 27 (D. Me. 1993).

For the foregoing reasons, and those stated in petitioners' opening brief, the judgment of the Supreme Judicial Court of Massachusetts should be reversed.

Respectfully submitted.

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